No. 84-1835

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IN THE

Supreme Court of the United States

October Term, 1984

AMERICAN INSURANCE ASSOCIATION, ALLIANCE OF AMERICAN INSURERS, NATIONAL ASSOCIATION OF INDEPENDENT INSURERS, AETNA CASUALTY AND SURETY COMPANY, ALLSTATE INSURANCE COMPANY, FARM FAMILY MUTUAL INSURANCE COMPANY, FIREMAN'S FUND INSURANCE COMPANY, HARTFORD FIRE INSURANCE COMPANY, INTERBORO MUTUAL INDEMNITY COMPANY, LIBERTY MUTUAL INSURANCE COMPANY, LUMBERMAN'S MUTUAL CASUALTY COMPANY, MARYLAND CASUALTY COMPANY, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, TRAVELERS INDEMNITY COMPANY, UTICA MUTUAL INSURANCE COMPANY, GERALD J. PIERCE, WEST END BREWING COMPANY OF UTICA NEW YORK, MARILYN STROHSCHEIN, MADELINE CHRISMAN and ADOLFINA RUIZ,

Appellants,

against

RODERICK CHU, Commissioner of Taxation and Finance of the State of New York, JAMES P. CORCORAN, as Superintendent of Insurance of the State of New York; and MARTIN A. FISCHER, ALBERT C. TODARO, EASTMAN BIRKETT, RIVKA CHATMAN, CHARLES G. MOERDLER, BART DIMATTINA, LOUISE COSTE, JAMES HENRY SCHOLTZ and LILLIAN ROBERTS, as Commissioners of the State Insurance Fund of the State of New York,

Appellees.

On Appeal from the Court of Appeals of the State of New York

MOTION TO DISMISS

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BEST AVAILABLE CO

Questions Presented

1. Did the Court below base its decision on an adequate and independent state ground, namely that the complaint presented no justiciable controversy under § 3001 of the New York Civil Practice Law and Rules, because the record disclosed no facts to show that any plaintiff has been, is being, or will ever be affected adversely by the statute which plaintiffs sought to have declared unconstitutional in an action for declaratory judgment?

2. In any event have plaintiffs failed to present a case or controversy under Article III of the Constitution?

3. Assuming that there is a case or controversy properly before this Court, have plaintiffs raised a substantial federal question as to whether the challenged statute has substantially impaired the obligation of contract in violation of Article I, § 10 of the Constitution?

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RODERICK CHU, Commissioner of Taxation and Finance of the State of New York, JAMES P. CORCORAN, as Superintendent of Insurance of the State of New York; and MARTIN A. FISCHER, ALBERT C. TODARO, EASTMAN BIRKETT, RIVKA CHATMAN, CHARLES G. MOERDLER, BART DiMATTINA, LOUISE COSTE, JAMES HENRY SCHOLTZ and LILLIAN ROBERTS, as Commissioners of the State Insurance Fund of the State of New York,

Appellees.

On Appeal from the Court of Appeals of the State of New York

MOTION TO DISMISS

Defendants, Roderick Chu as Commissioner of Taxation and Finance and James P. Corcoran, as Superintendent of

Insurance of the State of New York, move to dismiss the present appeal. Alternatively, should the Court treat appellants' Jurisdictional Statement as a petition for certiorari for the reason discussed in Point I, defendants urge that certiorari be dismissed for want of jurisdiction or denied. The grounds for the motion, or opposition, are that (1) the New York Court of Appeals invoked an adequate and independent rule of state law in dismissing the complaint; (2) in any event, there is no justiciable case or controversy within this Court's jurisdiction under Article III, and (3) even if there were, it is manifest that the questions on which the decision on the merits of the cause depend are so unsubstantial as not to merit review in this Court.

Counter-Statement of the Case

Plaintiffs have filed a Notice of Appeal and Jurisdictional Statement from a unanimous decision of the New York State Court of Appeals, 64 N.Y.2d 379 (1985), which dismissed their complaint for want of justiciability under CPLR § 3001. The Court of Appeals vacated the declaration of the intermediate appellate court, 102 A.D.2d 775 (1st Dept., 1984) that Chapter 55 of the Laws of 1982 ("Chapter 55"), insofar as challenged by plaintiffs, was constitutional in all respects. Plaintiffs attacked those provisions of the statute which authorized and directed the transfer to the State's General Fund of surplus from three other State Funds (hereinafter collectively called "the Three Funds") which are organized and operated under provisions of the New York Workers' Compensation Law ("WCL") and Insurance Law ("Ins. L.") to provide workers' compensation and property or liability insurance under certain circumstances.

Defendants rely on the facts set forth in the Court of Appeals' decision at J.S. App. 1a-4a. In addition, defendants note that the contingent appropriations provided for in Chapter 404 (discussed at J.S. App. 3a) have been enacted each year since 1982 in L. 1983, Ch. 50; L. 1984, Ch. 50; L. 1985, Ch. 50. These provisions are explicitly intended to maintain the solvency of the Three Funds through a re-transfer back to each Fund, if necessary, of the monies transferred from each Fund to the General Fund pursuant to Chapter 55.

All of the Three Funds are in the custody of and are administered by State officials as part of the State's sovereign operations in the fields of workers' compensation and insurance. For many years State officials have regulated the collection of payments into the Three Funds and disbursements therefrom under WCL § 27, 109-a, 142 and Ins. L. § 333-334. Chapter 55 is not the first instance of recent legislation directing disposition of monies from two of the Three Funds. In 1975 the Legislature directed the Aggregate Trust Fund ("ATF") to use its money to purchase $75 million in bonds of various State agencies and authorities as part of its investments. WCL § 27-a. In 1973 the Legislature directed that a certain portion of investment income from the Property and Liability Insurance Security Fund ("PLISF") be transferred to the General Fund (L. 1973, Ch. 861 § 11), and in 1979 the Legislature directed that investment income would henceforth be paid, not to the contributing carriers, but rather (1) for operating the so called "FAIR PLAN" for providing property insurance and (2) to the State's General Fund.

The Superintendent of Insurance, the statutory examiner of the ATF's accounts, and administrator of the other two Funds, attested without any rebuttal that there is no evidence to indicate that Chapter 55 would render any of the Funds insolvent or incapable of fulfilling their statutory functions. The courts below reviewed the respective financial reports attached as exhibits to the Superintendent's affidavit, and their findings are set out at J.S. App. 3a and 13a. Plaintiffs do not factually contest such findings here.

ARGUMENT

I.

Plaintiffs Have Erroneously Sought Review In This Court Under 28 USC § 1257(2).

The Court of Appeals dismissed plaintiffs' complaint on jurisdictional grounds without reaching the merits. Instead, the Court explicitly vacated the declaration by the intermediate appellate court that the challenged statute was constitutional, J.S. App. 4a. Accordingly, plaintiffs have erroneously sought to appeal the Court of Appeals' decision under 28 USC § 1257(2). Because no "decision is in favor of [the] validity" of the statute, that subsection is inapplicable. Defendants request the Court to deem the Jurisdictional Statement to be a petition for certiorari, under 28 U.S.C. § 2103, and to dismiss or deny the petition for the reasons below.

II.

The Court Of Appeals' Decision Rests On An Adequate And Independent State Ground.

The Court of Appeals properly construed CPLR § 3001, which expressly requires that a controversy be "justiciable" for a declaratory judgment to issue, as precluding relief in this case. The Court invoked a ground for decision that meets this Court's tests for adequacy and independence. It recognized that plaintiffs had averred no more than a nebulous, intangible and speculative harm, a throughly insufficient predicate for justiciability under § 3001. Plaintiffs stated only generalized conclusions of law in their complaint and, instead of buttressing these with specific facts on their motion for summary judgment, rested on their complaint alone. The individual plaintiffs never adduced a single fact showing that, as actual or potential beneficiaries of the Three Funds, any of them lost, or was threatened with losing, a penny in benefits. Likewise, the corporate plaintiffs who contribute to the Three Funds, have not shown that the statute has caused, or ever will cause them to contribute more to the Three Funds than they otherwise would.

Section 27 of the Workers' Compensation Law provides that an insurer or employer responsible for periodic payments with regard to an award made pursuant to that section must pay the present value of the award into the Fund, but then the Fund is solely responsible for such payments, and the carrier and employer are wholly discharged. WCL § 27(3). Nothing in Chapter 55 in any way dimin-

ishes their immunity. Insurance companies have no further financial obligations once they have made their statutorily mandated payments into their respective Funds; it is the responsibility of the Three Funds to meet subsequent obligations when and as necessary. There is no statutory requirement that the carriers pay any claims the Three Funds themselves are unable to reimburse. As a result, these appellants cannot demonstrate they will be harmed even if, for some reason, the appropriations mandated by Chapter 55 were unavailable.

Chapter 55 does not reduce benefits payable from any Fund, nor does it impose liability on an employer or carrier for compensation claims previously paid from the ATF and SWCF, nor on a carrier in the case of a PLISF award. Appellants have concocted vague allegations of increased concern about the Three Funds' solvency as demonstrating a justiciable controversy.*

The Court of Appeals' construction of CPLR § 3001 to dismiss this abstract complaint fully accorded with long-standing and consistently applied rules governing all declaratory judgment actions under New York law. (J.S. App. at 4a and authorities cited). The decision does not rest on specious reasoning, *compare, Lawrence* v. *State Commission,* 286 U.S. 276, 282-83 (1932), nor does it employ, in unexpected and inconsistent fashion, a procedural rule to thwart vindication of federal constitutional rights. *Compare, e.g., Barr* v. *Columbia,* 378 U.S. 146, 148-50

* Since Chapter 55 treats the yearly appropriations to SWCF and PLISF as an "admitted asset" thereof, there has been no change in the balances of these Funds for the purpose of determining how much insurers must contribute to them. WCL § 109-(b)(2)(b); Ins. L. § 334(7).

(1964). On the contrary, the Court of Appeals dismissed the complaint without prejudice and vacated a declaration by the intermediate appellate court that would have foreclosed plaintiffs from ever challenging Chapter 55, even if at some future time they could demonstrate sufficiently concrete harm to obtain a declaratory judgment. (J.S. App. at 4a, n. 1). The Court's decision hardly creates any "unreasonable obstacles" to asserting constitutional claims. *Compare, Davis* v. *Wechsler,* 263 U.S. 22, 24-25 (1923).

The Court of Appeals' insistence that plaintiffs present a justiciable controversy does not offend the federal Constitution, but rather advances a well-established and legitimate state interest in avoiding premature and unnecessary adjudication of constitutional issues. This Court itself has determined, *see Socialist Workers Party* v. *Gilligan,* 406 U.S. 583, 588 (1972) citing the *Rescue Army* v. *Municipal Court,* 331 U.S. 549, 584 (1947), that constitutional rulings with major implications for numerous non-parties, as well as for the instant litigants, should await the presentation of constitutional issues "in clean-cut and concrete form." *Rescue Army,* 331 U.S. at 584.

The Court of Appeals was correct as a matter of New York law in refusing to issue an advisory opinion to plaintiffs who have never demonstrated that Chapter 55 has had, or ever will have, the slightest actual impact upon them. Its decision affords plaintiffs another opportunity to challenge the statute should specific evidence of harm ever eventuate. They have failed to offer persuasive reasons for this Court to override the grounds for the decision below.

III.

Under Article III of the Constitution This Court Lacks Jurisdiction To Hear Plaintiffs' Challenge To Chapter 55.

Regardless of whether plaintiffs have properly sought review under § 1257(2) or whether the Court of Appeals' decision rests on an adequate and independent ground, plaintiffs lack standing or, alternatively, present no controversy that is ripe for determination under Article III. The same considerations that led the Court of Appeals to dismiss the complaint under New York law warrant dismissal here for want of jurisdiction under Article III. *Los Angeles* v. *Lyons,* 461 U.S. 95, 102 (1983); *Warth* v. *Seldin,* 422 U.S. 490, 501 (1975); *Laird* v. *Tatum,* 408 U.S. 1, 13-14 (1972); *Golden* v. *Zwickler,* 394 U.S. 103 (1969); *Communist Party* v. *Subversive Activities Control Board,* 367 U.S. 1, 71 (1967); *United Public Workers* v. *Mitchell,* 330 U.S. 75, 89-91 (1947); *Massachusetts* v. *Mellon,* 262 U.S. 447, 488 (1923).

Dismissing a plaintiff's constitutional challenge to another New York statute, which affected the plaintiff there in a largely hypothetical manner, Justice Brennan wrote for a unanimous Court:

> . . . In *United Public Workers of America* v. *Mitchell, supra,* at 89-90, we said:
>
> "The power of courts, and ultimately of this Court, to pass upon the constitutionality of acts of Congress arises only when the interests of litigants require the use of this judicial authority for their protection against actual interference. A hypothetical threat is

> not enough." The same is true of the power to pass upon the constitutionality of state statutes. No federal court, whether this Court or a district court, has "jurisdiction to pronounce any statute, either of a State or of the United States, void, because irreconcilable with the Constitution, *except as it is called upon to adjudge the legal rights of litigants in actual controversies.*" *Liverpool, N.Y. & P.S.S. Co.* v. *Commissioners*, 113 U.S. 33, 39 (1885). (Emphasis added). *See also United States* v. *Raines*, 362 U.S. 17, 21 (1960). The express limitation of the Declaratory Judgment Act to cases "of actual controversy" is explicit recognition of this principle.

Golden v. *Zwickler*, 394 U.S. at 110. (emphasis in original).

Resting upon their complaint, plaintiffs ask this Court to invalidate certain provisions of Chapter 55 under the Contract Clause. That pleading simply sets forth the identity of the parties, quotes the provisions of the statutes on which they rely and the provisions of Chapter 55 that they attack. Then in two brief paragraphs plaintiffs conclusorily aver that the challenged provisions impair contractual obligations which they infer from the quoted provisions of the WCL and Insurance Law.* Nowhere in

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* The plaintiffs' Contract Clause claim is set out below:

FIRST CAUSE OF ACTION

22. Plaintiffs repeat paragraphs 1 through 21 of this Complaint.

23. The State of New York, by creating the Funds to provide protection against losses that might result from insurance company insolvencies; by segregating the assets of the Funds from all State money and from the assets of other similar funds; and by expressly promising in statutes to keep the Funds separate, apart and inviolate, made contractual commitments not to raid the Funds for general State purposes. The State made these commitments to, or for the benefit of: (a) the insurance companies which made payments into

(footnote continued on next page)

the complaint do plaintiffs allege particular tangible harm, i.e. a single person who has lost benefits or is threatened with a loss of benefits or a single insurer or employer who must pay additional contributions to one of the Three Funds. Plaintiffs have not demonstrated that they have suffered or will suffer "distinct and palpable injury" *Warth* v. *Seldin*, 422 U.S. at 501, or that they have sustained or are immediately in danger of sustaining some "direct injury." *Massachusetts* v. *Mellon*, 262 U.S. at 488. Instead, plaintiffs proffered no factual supplementation at all, and as the Court below found, never rebutted defendants' specific proof that their concerns are thoroughly subjective, insubstantial and speculative.

Plaintiffs heavily rely on *United States Trust Company* v. *New Jersey*, 431 U.S. 1 (1977). No issue of justiciability arose there because the harm to bondholders, in concrete financial terms, was self-evident. The bondholders, had expectations regarding a return on their financial investment. One need not be an expert in the bond market to know that the moment the challenged legislation took effect in *United States Trust Company* the market value of

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the Funds, including the insurance company plaintiffs and other members of plaintiffs AIA, the Alliance and NAII; (b) the policyholders who purchased insurance policies and paid premiums in reliance on the protection afforded by the Funds, including the policyholder plaintiffs; and (c) the beneficiaries of insurance policies who are to receive payments from the Funds, including the beneficiary plaintiffs.

24. Chapter 55 of the Laws of 1982 to the extent that it directs the payment of assets of the Funds to the general fund of the State treasury impairs the obligations of the State's contracts with plaintiffs and others, in violation of the contract clause of the United States Constitution, Article I, § 10.

25. Plaintiffs have no adequate remedy at law.

the bonds would drop because of the adverse change in contractual terms, thereby causing monetary loss to them. This Court noted that the trial court had made an explicit finding that the value of the bonds was adversely affected by the repeal of the covenant. 431 U.S. at 19 In contrast, since appellants have no expectations of any sort of investment return with respect to the monies they contribute to or receive from the Funds, and have submitted no claim of other financial harm, plaintiffs' reliance is misplaced.

Plaintiffs' other main support, *Duke Power Co.* v. *Environmental Study Group, Inc.*, 438 U.S. 59 (1978) is, if anything, even more clearly distinguishable. There this Court reviewed an extensive trial record which revealed that the appellees had suffered several different types of "'immediate' adverse" effects, including a threatened reduction in property values, 438 U.S. at 73-74. Based on that detailed evidentiary record, the Court had little difficulty in finding both standing and ripeness. These plaintiffs present a record completely barren of the kind of immediate adverse impact that was central to the *Duke Power* decision.

Finally, plaintiffs cannot escape the jurisdictional bar of Article III by analogizing this case to a routine breach of contract action to compel specific performance. J.S. App. at 9 Plaintiffs pursue no ordinary common law remedy. Instead, they ask this Court to declare a state statute unconstitutional, a step that this Court studiously avoids unless necessary, *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 347 (1936) (Brandeis, J. concurring), and only when the complaining litigant has shown actual, not

theoretical, harm from the statute's enforcement. *See, e.g., Socialist Workers Party* v. *Gilligan, supra, Golden* v. *Zwickler, supra.* Having sued under the Contract Clause, plaintiffs cannot obtain declaratory relief without some showing of actual or threatened financial adversity. They have not even attempted to do so. This Court has previously declined to regard a claim as porous as theirs as constituting a justiciable controversy under Article III, and defendants urge dismissal for want of jurisdiction.

IV.

Assuming *Arguendo* a Justiciable Controversy, Plaintiffs Have Presented No Substantial Federal Question Under Article I, § 10.

Plaintiffs contend that under U.S. Constitution, art. I, § 10 ("the Contract Clause") the State bound itself contractually by the terms of the WCL and Insurance Law to devoting monies in each Fund solely for compensation or insurance purposes. There is no substance to this position.

This Court has repeatedly refused to infer such contractual promises from state statutes in the absence of clear evidence that a legislature intended to make them. *Dodge* v. *Board of Education,* 302 U.S. 74, 79 (1937); *Wisconsin & Michigan Ry Co.* v. *Powers,* 191 U.S. 379, 385 (1903). Just this term the Court reiterated that long established rule. In *National Railroad Passenger Corp.* v. *Atchison, Topeka & Santa Fe Railroad Co.,* —— U.S. ——, 84 L. Ed. 2d 432 (1985) the Court stated:

> . . . For many decades, this Court has maintained that absent some clear indication that the legislature in-

> tends to bind itself contractually, the presumption is that "a law is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise." Dodge v. Board of Education, 302 US 74, 79 (1937) . . .
>
> In determining whether a particular statute gives rise to a contractual obligation, "it is of first importance to examine the language of the statute." Dodge v. Board of Education, supra, at 78, . . . "If it provides for the execution of a written contract on *behalf of the state* the case for an obligation binding upon the state is clear." 302 U.S., at 78, 82 L Ed 57, 58 S Ct 98 (emphasis supplied). But absent "an adequate expression of an actual intent" of the state to bind itself, Wisconsin & Michigan, R. Co. v. Powers, 191 U.S. 379, 386-387, Ed 229, 24 S Ct 107 (1903), this Court simply will not lightly construe that which is undoubtedly a scheme of public regulation to be, in addition, a private contract to which the state is a party.

(84 L. Ed. 2d at 446, emphasis in original).

The laws involved here created no contract rights; rather, they implement regulatory policies. Their applicability does not depend upon the voluntariness of parties to employment of insurance contracts. *Jensen* v. *Southern Pacific Ry. Co.*, 215 N.Y. 514, 526-28 (1915), *r.o.g.* 244 U.S. 205 (1916); *Schmidt* v. *Wolf Contracting Co.*, 269 A.D. 201 (3d Dept. 1945), *aff'd*, 295 N.Y. 748 (1946); *Montgomery* v. *Daniels*, 38 N.Y. 2d 41 (1976). Every employer within statutory definitions must procure workers' compensation insurance. WCL § 50. Motor vehicle registrants ordinarily must procure motor vehicle insurance, N.Y. Vehicle and Traffic Law, §§ 342, 345. Every insur-

ance company that wishes to write compensation insurance in New York has no choice but to contribute to ATF and SWCF (or its equivalent for mutual insurers), WCL §§ 27, 109-a. Every casualty carrier must contribute to PLISF, Ins. Law § 334.

Thus, the creation of the Funds was in aid of general legislative policies in the realm of economic and social welfare, and the Funds were plainly not created as part of any contractual undertaking by the State. Accordingly, there is no basis for implying any legislative intent to enter into any contracts with appellants. There has not been the kind of bargained-for exchange between parties, consideration, and reliance that are the hallmarks of a contractual relation which could be impaired at all.*

Plaintiffs' reliance on *United States Trust, supra,* is again erroneous. There the bondholders, when they paid for their bonds, had clearly given consideration in exchange for the State's specific promises. In contrast,

* The lack of any detrimental reliance is especially pertinent to ATF and PLISF. In 1975 the Legislature directed the ATF monies be used to purchase seventy-five million dollars in State bonds and State public authority bonds. WCL § 27-a. In 1969 the Legislature significantly expanded the purposes of the predecessor of the PLISF when it merged that fund into the PLISF. Ins. L. § 334(1)(2) added by Laws of 1969, Ch. 189. In 1973 the Legislature directed part of the investment income of the PLISF be so transferred and in 1979 that all of it be transferred. Ins. L. § 334(5); L. 1973, Ch. 861 § 11; L. 1979, Ch. 503, § 4. No employee, policyholder or beneficiary could reasonably harbor settled expectations that subsequent legislation, such as Chapter 55, would not further regulate the disposition of ATF and PLISF monies. This Court has consistently viewed such "extensive and intrusive" regulation of particular enterprises to be fatal to Contract Clause claims. *National Railroad Passenger Corp.*, 84 L. Ed. 2d at 448; *Energy Reserves Group, Inc.* v. *Kansas Power & Light Co.*, 459 U.S. 400, 413-14 (1983); *Veix* v. *Sixth Ward Assn.*, 310 U.S. 32, 38 (1940); *compare Allied Structural Steel* v. *Spannaus*, 438 U.S. 234, 250 (1978).

none of these appellants voluntarily paid a penny in consideration for the provisions of the WCL and Insurance Law. They are eligible for benefits because the Legislature, exercising its broad powers to regulate insurance and workers' compensation, gratuitously decided to afford them those benefits.

Plaintiffs focus myopically on the "pledge" of the state's faith and credit in WCL § 109-b and Ins. L. § 333(6). The Legislature was not using those words in a contractual context at all. It was only expressing a policy directed to citizens of the State generally for whose benefit it approved this remedial legislation. The words do not pledge the State's faith and credit to keeping any of the Three Funds separate, apart and inviolate. Instead, the phrase expresses the Legislature's intention to assure payment to potential beneficiaries. Chapter 55 provides a specific mechanism to insure the continued solvency of the Three Funds, and the legislation challenged here is fully consistent with that legislative intent.

Plaintiffs misinterpret other aspects of WCL §§ 27, 109-b and Insurance Law §§ 333-334. These statutes do not provide that all of the money in each Fund shall always be committed to one purpose; they do not even require that each Fund contain a particular dollar level of assets or that such assets be held in some irrevocable trust. The WCL and Insurance Law sections governing the SWCF and PLISF do not even mention the word "trust"; and, as to WCL § 27, this statute actually says ATF will be "an indivisible and aggregate trust fund *except as here-*

inafter provided." (emphasis added) That is hardly the language of a binding contract.*

Finally, even assuming that the text of WCL § 109-b and Ins. L. § 333(6) rises to the level of a legislative contract as to SWCF awards or PLISF awards, (*see Perry* v. *United States*, 294 U.S. 330, 351 [1935]), appellants have still failed to show unconstitutional impairment. In *Allied Structural Steel* v. *Spannaus*, 438 U.S. 234, 244-45 (1978), this Court stated that the threshold inquiry "must be whether the state law has, in fact, operated as a *substantial impairment* of a

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* The Legislature's treatment of the SWCF is especially instructive in this regard. The Legislature amended WCL § 107 in 1979 by directing the Superintendent to designate "sufficient assets from this fund for the payment of such claims which shall not at any time be diverted to any other use or purpose." L. 1979, Ch. 150. It is obvious that the Legislature was not mandating that all of the SWCF be devoted to payment of claims, since it authorized using the SWCF for the return of unearned premiums to the carriers under certain conditions. Rather, the Legislature distinguished between "sufficient assets from this Fund for the payment of claims", and surplus, the use of which the Legislature did not restrict.

Since the SWCF had thirty-nine times as much money on April 1, 1982 as it had ever paid out in claims, the Legislature did not act irrationally in concluding that transferring a portion of SWCF monies to the General Fund would not contravene this 1979 amendmnt. There would continue to be in the SWCF nearly six times as much money as had ever been awarded and more than twenty times as much money as it had ever awarded in any one year, purely apart from the yearly contingent appropriation. J.S. App. at 13a

As to appellants' charge that the separate status of the Three Funds is in jeopardy, the facts are otherwise. Section 27 of the WCL provides that monies of the ATF be kept separate from monies in the "state fund", i.e. the State Insurance Fund (SIF). Nothing in Chapter 55 merges the ATF with the SIF. They will continue to be operated as separate State funds. In fact a separate appropriation for the ATF is annually required under Chapter 55. (WCL § 27-c added as § 84 of Chapter 55) Nor does Chapter 55 merge the SWCF or the PLISF with other State funds or State monies. Both Funds will continue to operate separately, and Chapter 55 expressly requires that separate appropriations be encumbered each year for each Fund to be used, if necessary, to insure the solvency of each Fund. (WCL § 109-b(2), Ins. L. § 334(6) enacted as §§ 88-89 of Chapter 55)

contractual relationship." (emphasis added). Without the slightest factual proof that Chapter 55 will have *any* impact, let alone severe impact on the solvency of the Three Funds —each of which holds excess monies and each of which would be replenished, should the need arise, by the express terms of Chapter 55—it is not even arguable that the challenged statute operates as an unconstitutional "severe" impairment. *Cf. Spannaus,* 438 U.S. at 245. This case does not remotely resemble either the total abrogation of insurance policies struck down in *United States* v. *Lynch,* 292 U.S. 571 (1934), or the clear disregard of a specific contract term as in *United States Trust, supra* or *Perry* v. *United States, supra.* Plaintiffs' Contract Clause claim fails under numerous decisions of this Court, both recent and longstanding, even assuming it were justiciable.

Conclusion

For the Foregoing Reasons the Appeal Should Be Dismissed or Alternatively, If the Jurisdictional Statement Is Treated As a Petition For Certiorari, the Petition Should Either Be Dismissed For Want Of Jurisdiction Or Denied.

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Respectfully submitted,

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